In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 346

CHARLES PECKAT MANUFACTURING COMPANY, PETITIONER

v.

JOHN T. JARECKI, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 136-142) is reported at 196 F. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1952. (R. 142.) A petition for rehearing filed on June 18, 1952, was denied on June 25, 1952. (R. 142-143.) The petition for a writ of

certiorari was filed on September 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the courts below erred in holding that upon the undisputed facts the taxpayer corporation was the "manufacturer" of certain automobile sun visors within the meaning of the manufacturers' excise tax provisions of the Internal Revenue Code.[1]

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 3403. TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * *

[1] The taxpayer corporation does not challenge the directed verdict (R. 119, 131, 132) that it passed the manufacturers' excise taxes on to its customers. In fact, the president of the taxpayer corporation admitted that the price at which it sold the visors included the tax. (R. 70.) Section 3443(d) of the Internal Revenue Code prohibits any refund of manufacturers' excise taxes to a taxpayer who has passed on such taxes to his customers, except to the extent that those customers have been reimbursed or have consented in writing to the refund to the taxpayer. The taxpayer corporation obtained such consent to refund from only one of its customers who had purchased only one of the visors. (R. 124.) Accordingly, since the taxpayer corporation stipulated that any recovery by it should be limited to 8 cents per visor (R. 127-128, 138), the maximum possible recovery by the taxpayer corporation in this case would be only 8 cents.

(c) [As amended by Sec. 544(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, 711] Parts or accessories (other than tires and inner tubes and other than radios) for any of the articles enumerated in subsection (a) or (b), 5 per centum. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 3403.)

Treasury Regulations 46 (1940 ed.):

SEC. 316.4. *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and not the person who buys, and assembles a taxable article from, such component parts.

STATEMENT

Petitioner sued in the District Court for the Northern District of Illinois to recover manufac-

turers' excise taxes paid under protest. It was stipulated that the taxpayer had been assigned a patent covering brackets for fastening sun visors on automobiles; that under such assignment the taxpayer had entered into an agreement (attached to and made a part of the stipulation) with the Davis Stamping Company to have the latter fabricate visors including such brackets for the taxpayer; and that at all times material the taxpayer and Davis Stamping Company carried out and followed the terms of the agreement. (R. 127-128.)

The terms of this agreement between the taxpayer and Davis Stamping Company were: The taxpayer would pay for the tools. Davis Stamping Company would ship the finished products from its plant in Detroit, f.o.b. its plant, in the name of the taxpayer. Davis Stamping Company would forward to the taxpayer's office in Maywood, Illinois, on the same day as shipped, copies of all bills of lading and other pertinent information in order that prompt billings might be made by the taxpayer to its customers. After completion of a certain number of units, analysis of production costs and tool amortization would be made for the purpose of adjusting Davis Stamping Company's unit charge to the taxpayer. If the Treasury Department should rule that the taxpayer was the manufacturer for purposes of the levying of the excise tax, the taxpayer would furnish Davis Stamping Company with the necessary exemption certificate to enable it to omit the tax on its billing to the taxpayer. Orders received by Davis Stamping Com-

pany from the taxpayer would be considered firm orders and any cancellation would be at the taxpayer's responsibility for all raw materials and fabricated parts and supplies purchased for such orders, subject to whatever recovery Davis Stamping Company might be able to obtain from its suppliers. (R. 128-129.)

Prior to trial, on the basis of the foregoing facts, the Collector filed a motion for judgment (R. 5-8), and the court took this motion under advisement.

A jury was impanelled and the following testimony was given by witnesses for the taxpayer: The taxpayer and Davis Stamping Company were separately owned corporations. (R. 23.) The visors were fabricated by employees of Davis Stamping Company in the latter's plant and with the latter's stamping equipment. The taxpayer owned the dies and tools. (R. 55, 56.) The visors were made of stainless steel (R. 50) and had the taxpayer's registered trademark stamped upon them (R. 20, 21, 45). The taxpayer collaborated with Davis Stamping Company in obtaining the right to use the stainless steel. (R. 50-53.) Estimates were furnished to Davis Stamping Company as to the number of visors the taxpayer would use, based on sales projections of the taxpayer's sales representative. (R. 53.) Davis Stamping Company purchased the steel required. The Davis Stamping Company billed the taxpayer $6.30 per complete unit on the visors. (R. 35, 36.) This charge did not include any excise tax. (R. 47.) The taxpayer

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set its price to distributors at $8.08 per visor. (R. 63.) This price included the excise tax. (R. 70.) In addition to the excise tax, the taxpayer paid for such items as advertising, and labels for the cartons in which the visors were shipped. (R. 59.) The taxpayer advertised that it was the manufacturer of the visors. (R. 42-43, 68.) By means of fair trade agreements in those states where such agreements are legal the taxpayer attempted to maintain the list price of the visors at $17.95 each. (R. 45, 61.) Bills of lading covering shipments of the visors were made out in the name of the taxpayer. (R. 60.) The taxpayer received the orders for visors from customers and had the right to direct whom Davis Stamping Company could ship them. Davis Stamping Company could ship the visors only at the direction of the taxpayer or the taxpayer's sales representative. (R. 60, 67.)

At the close of the taxpayer's case the Collector filed a motion for a directed verdict on the ground that there was no substantial evidence that the taxpayer was not the manufacturer of the visors or that the taxpayer had not passed on to its customers the tax which it was seeking to recover. (R. 130-131.) This motion was granted by the District Court. (R. 117-119, 132.) The Court of Appeals affirmed. (R. 136-141.)

ARGUMENT

The Court of Appeals held that on the undisputed facts the taxpayer was the manufacturer of the automobile sun visors within the meaning of

Section 3403 of the Internal Revenue Code (*supra*, pp. 2-3). It stated (R. 140):

> Admittedly either plaintiff or Davis made the initial sales as the manufacturer of the sun visors. In this suit plaintiff had the burden of proof to show that it was not the initial seller, the "manufacturer." The decision must be based on the legal conclusions to be drawn from the undisputed fact relationship between plaintiff and Davis.

Its decision that the taxpayer was the manufacturer for excise tax purposes, and that the motion for directed verdict was properly granted, is clearly correct, turns on the particular facts involved, and presents no question warranting review.

It has been frequently held that for tax purposes the term "manufacturer" may include one who has contracted with others for the actual fabrication of the product. *Carbon Steel Co.* v. *Lewellyn*, 251 U.S. 501; *Bedford Mills, Inc.* v. *United States*, 59 F. 2d 263 (C. Cls.), certiorari denied, 290 U.S. 655; *Chandler Laboratories, Inc.* v. *Smith*, 88 F. Supp. 583 (E.D. Pa.); *Foss-Hughes Co.* v. *Lederer*, 287 Fed. 150 (E.D. Pa.). See also: *State* v. *Clarke*, 64 Minn. 556; *State* v. *State Board of Assessors*, 54 N.J.L. 430, affirmed, 56 N.J.L. 717. The applicability of this principle in the instant case is confirmed by Section 316.4 of Treasury Regulations 46 (*supra*, p. 3).[2] Since the undisputed facts

[2] Section 316.4 of Treasury Regulations 46 provides in part:

> Under certain circumstances, as where a person manufactures or produces a taxable article for a person who